

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

7-24-

74-1597

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United States Court of Appeals

FOR THE SECOND CIRCUIT

WILLIAM W. MEED,

Plaintiff-Appellant,

—against—

LOUIS FRANK, as Police Commissioner of Nassau County
(Successor to FRANCIS B. LOONEY, former Police Com-
missioner of Nassau County), and THE NASSAU COUNTY
POLICE DEPARTMENT,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF OF PLAINTIFF-APPELLANT

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Preliminary Statement

At the outset it should be recalled that the event which gave rise to this proceeding was an alleged theft by plaintiff-appellant William W. Meed (hereinafter referred to as "Meed") of "two one-pound cans of coffee, a rubber mat and a package of sponge cloths". The total retail value of these items was approximately \$5.00 to \$10.00.

This reply brief shall respond *seriatim* to the counter-questions presented and the points set forth in the brief for defendants-appellees (hereinafter referred to as the "Police Department").

With respect to the counter-questions presented, commencing on page 1 of the Police Department's brief, the Police Department failed to mention that the reason the court below did not pass on the fourth counter-question presented relating to Meed's "Federal claims" was that that question was not submitted to or raised before the court below. This court has on numerous occasions indicated that it does not encourage attempts to litigate issues before it which were not raised in the court below. E.g., *Green v. Brown*, 398 F.2d 1006, 1009 (2d Cir. 1968). The point relating to the aforementioned counter-question presented should be considered accordingly.

POINT I

The Police Department's failure to respond to Meed's first point, to wit, that his complaint set forth facts sufficient to establish a Federal question founded upon the United States Constitution which was not vulnerable to the Police Department's motion to dismiss on the grounds that the action was not timely instituted, indicates a tacit acceptance by the Police Department of the merits of that point.

The Police Department's statute of limitations argument, which is *verbatim* the same argument it presented to the court below and which commences at page 5 of its brief, was conceded by Meed in his main brief at page 7. However, the Police Department did not in any way respond to Meed's point that his complaint set forth facts sufficient to establish a federal question founded upon the United States Constitution which was not vulnerable to the Police Department's motion to dismiss based upon statute of limitations grounds and accordingly the complaint properly

should not have been dismissed by the District Court on those grounds. Implicit in the Police Department's failure to respond to Meed's point is a tacit acceptance by the Police Department of the merits thereof.

POINT II

The Police Department has failed to meet its burden of showing that the issues raised in the complaint had been litigated and decided in the State Courts and accordingly the complaint is not subject to dismissal on the grounds of *res judicata*.

The Police Department's *res judicata* argument that the "issues in this case have been fully litigated in the State courts," which commences at page 7, is at variance with, and falls before, Meed's argument that the issue of the Trial Commissioner's failure to make findings of fact following the Police Department hearing was raised for the first time in the complaint in this action and had not previously been presented to, litigated or decided—either expressly or implied, by any state court which had heard, or been sought to hear, this matter. The Police Department's reliance on the opinion of the Appellate Division in the second Article 78 proceeding, which it quotes in full, to establish that the issue of the Trial Commissioner's failure to make findings of fact was previously decided is misplaced. As noted in Meed's main brief at page 13, footnote 12, the language of the opinion relating to the conduct of the Police Department hearing referred to matters which took place during the course of the hearing and not to the issue of the Trial Commissioner's failure to make findings of fact after the end of the hearing.

With reference to the last two paragraphs contained under Point II of the Police Department's brief at pages

9 and 10, recent decisions of the United States Supreme Court indicate that a public employee may properly be questioned by his employer relating to the performance of his official duties, so long as he has not been coerced to waive his immunity regarding the use of his answers in a criminal proceeding against him. *Gardner v. Broderick*, 392 U.S. 40, 88 S.Ct. 1913 (1968), *Uniformed Sanitation Men Assn. v. Commissioner of Sanitation*, 392 U.S. 284, 88 S.Ct. 1917 (1968), *Lefkowitz v. Turley*, 414 U.S. 70, 94 S.Ct. 316 (1973). Such was not the case here for at least two reasons. First, Meed was interrogated about activities other than those relating to the performance of his official duties, to wit, a trip to a department store while he was off duty. Second, his answers would not have been immune from use in a criminal proceeding against him. See, *Confederation of Police v. Conlisk*, 489 F.2d 891 (7th Cir. 1973) for an excellent analysis of the case law development of this subject.

POINT III

The Police Department has failed to meet its burden of showing to a certainty that the issues raised in the complaint had been decided in the State Courts and accordingly the complaint is not subject to dismissal on the grounds of collateral estoppel.

The Police Department's third point, founded upon the principle of collateral estoppel, commencing at page 10 of its brief, is noteworthy in at least two respects. First, the Police Department's briefs to the court below, did not contain a separate point founded upon collateral estoppel. The portion of the Police Department's third point which deals with *Taylor v. New York City Transit Authority*, 309 F. Supp. 785 (E.D.N.Y. 1970), *aff'd*, 433 F.2d 665 (2d

Cir. 1970) is *verbatim* the argument it presented in its main brief to the court below under its point based upon *res judicata* principles. Second, the Police Department, by raising its collateral estoppel argument to the level of a new point, has tacitly recognized that this action is not brought upon the same cause of action as the state court proceedings.

In the leading case of *Cromwell v. County of Sac*, 94 U.S. 351, 352-3, 24 L.Ed. 195 (1876), the court considered the differences between the principles of *res judicata* and collateral estoppel. In substance, it found that collateral estoppel has always been a more narrowly applied bar than *res judicata*. Since collateral estoppel applies in a second, different cause of action to bar relitigation of issues conclusively adjudicated in a prior cause of action, it must be shown to a certainty that the judgment in the first cause of action did indeed entail adjudication of the assertedly barred issue.

As previously noted, the issue of the Trial Commissioner's failure to make findings of fact was not presented to, litigated or decided by any state court in which Meed prosecuted an action or to which Meed sought leave to do so. Unquestionably, it has not been shown to a certainty that any judgments in the state court proceedings entailed adjudication of the issue of the Trial Commissioner's failure to make findings of fact.

The *Taylor* case, *supra*, set forth at pages 12 to 14 of the Police Department's brief, dealt primarily with the effect to be accorded to determinations of state appellate administrative agencies—in that case, the New York City Civil Service Commission. In contradistinction, this action is not involved in any way with determinations of state appellate administrative agencies. Rather, this action

is concerned primarily with the effect to be accorded to decisions of state courts. The thrust of the quoted portion of Judge Weinstein's opinion and of the opinion of this court is directed to state appellate administrative agencies, and should properly be read in that context.

POINT IV

This action is not subject to the doctrine of abstention.

As noted in the Preliminary Statement above, Point IV of the Police Department's brief was neither submitted to nor raised before the court below. It should be read in the light of admonitions of this court regarding such procedures.

England v. Louisiana Medical Examiners, 375 U.S. 411, 84 S.Ct. 461 (1964), set forth at pages 15 and 16 of the Police Department's brief, is inapposite and irrelevant to this action. The *England* case arose in the context of the doctrine of abstention. In this connection, Mr. Justice Douglas, in a concurring opinion, succinctly observed, at 427:

"The question now presented is how and when one who asserts his 'option' to sue in the 'federal rather than in the state courts,' but who is remitted to the state court for a preliminary ruling, loses his right to return to the federal court for a final adjudication on the constitutional issues."

The instant action represents the first time Meed has sued in the federal courts, and this action has not been remitted by the federal courts to the state courts for any reason. Accordingly, this action is not in any way involved with the doctrine of abstention. The portion of the *England*

opinion quoted in the Police Department's brief should properly be read as limited by the context of the doctrine of abstention. As so read, it does not support the propositions for which it has been cited by the Police Department. See, *Suarez v. Administrator Del Deporte Hipico De Puerto Rico*, 354 F. Supp. 320 (D.P.R. 1972).

POINT V

Defendants-appellees are properly "persons" subject to suit within the meaning of the Civil Rights Act.

In *Manfredonia v. Barry*, 336 F. Supp. 765 (E.D.N.Y. 1971) an action was brought against the Suffolk County Commissioner of Police, in his official capacity, and other county officials in their official capacities under 42 U.S.C. §1983 for alleged violations of plaintiffs' civil rights. The defendants moved to dismiss on the sole ground that they were not "persons" suable within the meaning of the Civil Rights Statute, 42 U.S.C. §1983—the very argument asserted by the Police Department under Point V. The court denied the motion to dismiss. It reasoned at 768:

"The action is brought solely against individuals who, under color of their respective positions in the County, are alleged to have engaged in acts which plaintiffs claim were in violation of their civil rights. The description in their complaint of defendants' official positions does not transform the action into one against the County. Indeed, in order to establish that defendants were acting 'under color of law,' a recitation of their governmental status would seem to be essential."

By a parity of reasoning, the defendants named in this action are properly "persons" within the meaning of section 1983.

In the *Manfredonia* case, *supra*, the court, in reaching its decision, also quoted the following sentence from *Harkless v. Sweeny Independent School District*, 427 F.2d 319, 323 (5th Cir. 1970), *cert. denied* 400 U.S. 991, 91 S.Ct. 451 (1971):

"In numerous cases since *Monroe v. Pape*, the Supreme Court has permitted relief under §1983 against state officials sued as such, without mention of that case."

CONCLUSION

The Decision of the Court Below Dismissing the Complaint Should Be Reversed.

Dated: New York, N.Y.

July 24, 1974

Respectfully submitted,

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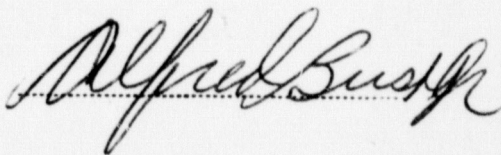
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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
CITY OF NEW YORK,
COUNTY OF New York , ss.:

Alfred Bush Jr., being duly sworn, deposes and says that he is over 18 years of age. That on the 24 day of July, 1974, he served 2 copies of the within Reply Brief upon John F. O'Shaughnessy, the attorney for the ~~above named~~ Defendants Appellees by depositing 2 copies of the same securely enclosed in a post-paid wrapper in a branch depository maintained and exclusively controlled by the United States Post Office at Greenwich & Vestry Street. addressed to said attorney for the Defendants Appellees at No. Nassau County Executive Bldg. Mineola, N.Y. 11501, that being the address within the State designated by him for that purpose upon the preceding papers as the place where he regularly kept an office, and at which place he regularly received mail.

Sworn to before me this
24 day of July, 1974.



PETER MEILEN
NOTARY PUBLIC, State of New York
No. 31-7686276
Qualified in New York County
Commission Expires March 30, 1976